



Social Media in the Workplace:

Examining
Implications and
Managing Risks

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Today's Agenda

- Dangers in relying on social media contents to make employment-related decisions.
- Scrutiny from employment-related agencies.
- Discovery and preservation issues.
- Social media best practices.

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Social Media Landscape



How are Employers Utilizing Social Media?

LinkedIn	Search for candidates	96%
	Contact candidates	94%
	Keep tabs on potential candidates	93%
	Vet candidates pre-interview	92%
	Post jobs	91%
facebook	Showcase employer brand	65%
	Generate employee referrals	51%
	Post jobs	48%
	Vet candidates post-interview	35%
twitter	Showcase employer brand	47%
	Post jobs	43%
	Generate employee referrals	31%
	Contact candidates	19%
	Vet candidates post-interview	18%

Source: Jobvite Social Survey 2013

- Advertising/promoting business.
- Encouraging employees to use social media to promote the company and enhance business relationships.
- Recruiting/hiring.
- Investigations and terminations of employees.
- Defense in litigation.

Recruitment and Hiring.

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**"I need your Facebook password before I can hire you.
If you're not on Facebook, I need you to join and post a
bunch of personal stuff you don't want me to know about."**

Applicants Are Rejected Based on Social Media Posts

- Lifestyle concerns - 58%
- Inappropriate comments and texts - 56%
- Unsuitable photos, videos, and information - 55%
- Comments or text from friends/ family - 43%
- Critical comments related to employment - 40%
- Inappropriate comments/text by others - 40%
- Membership in certain groups/networks - 35%
- Discovering candidate provided false information - 30%

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“Ousted mayor makes
no apologies for lingerie photos”



Applicants Are Accepted Based on Social Media Posts

- Information about the candidate's personality and fit - 50%
- Supports of the candidates professional qualifications – 39%
- Good communication skills - 35%
- Candidate is well rounded - 33%
- Positive references - 19%
- Awards or professional recognition - 15%

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Minimizing Risks When Using Social Media in Hiring

- Be consistent
- Job-related criteria only
- Review by a non-decision maker
- Disclosure to candidate
- Permission to review

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Social Media Use During Employment Relationship

- Social Media at work:
 - Limit
 - Prohibit
- Social media outside of work
 - Difficult to control and monitor
 - Develop policies that encourage employees to represent the employer well and in a favorable light

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Employees Slip Up Often on Social Media After Hire

- “Ding dong the deal is dead! Turns out I won’t have to work all week.... Christmas is saved!”
- “First sale is in the books! Thanks XYZ company!”
- “So happy they are finally getting rid of [Sally]! Cannot believe she got away with dating you-know-who for this long!”
- “Enjoying the sun at Thurby! Glad I called in today, so worth skipping work =)”



First Amendment Considerations

- Public employers may not restrict their employees’ First Amendment rights to comment on matters of public concern.
- Courts work to strike a balance between the interests of employees as citizens and the interests of the public agency employer(s) in efficiently providing public services through their employees.



Types of Forums

- traditional public forums (e. g. – a city park);
- designated public forums (e.g. – a government space opened up for public expression);
- limited public forums (e.g. – certain government message boards);
- non-public forums (e.g. – government-owned spaces not used for expressive purposes, like offices).



First Amendment Analysis

1. Was the employee speaking as a citizen on a matter of **public concern**.
 1. **If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.**
 2. If the answer is yes, then the possibility of a First Amendment claim arises.
2. Does the relevant government entity have an adequate justification for treating the employee differently from any other member of the general public.



Matter of 'Public Concern'

- Information shared by the employee helps community members make informed decisions about the operation of their government.
- Examples –
 - Unlawful conduct by a government employee
 - Illegal activity within a government agency
 - Misuse of public funds and inefficiency in operating
- Individual personnel disputes and grievances that are not relevant to the evaluating public agency performance are generally *not* matters of public concern.

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Risks Resulting from First Amendment Violations

Adverse employment action based on such comments may give rise to claims of

- retaliation
- whistleblower

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Busted by the Boss

-----Original Message-----

From: Kevin Colvin [mailto:kevin.colvin@hugoboss.com]

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

Busted by the Boss

From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD



More Pitfalls for Employers

- Sex
- Race
- Date of birth
- Marital status
- Religious views

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Applicable Statutory Framework

- Title VII of the Civil Rights Act (race, sex, national origin, religion)
- Americans with Disabilities Act
- Age Discrimination in Employment Act (over age 40)
- Executive Order 11246 (protection for federal contractors and federally-assisted construction contractors and subcontracts)



Potential Risks for Employers

- Protected legal off-duty activities
- Whistleblower protections
- Stored Communication Act
- Electronic Communications Privacy Act
- Social Media Privacy Acts
- Defamation
- Right to Privacy
- Contextual Deficiencies



Fourth Amendment Considerations

- The Fourth Amendment applies “when the Government acts in its capacity as an employer.”
- While a warrant is typically required before the government may conduct a search; a warrantless search by a government employer is reasonable if it is conducted for
 - “a noninvestigatory, work-related purpose” or
 - “investigatio[n] of work-related misconduct;” and
 - if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.”



What Courts Think about Employers Using Social Media to Make Employment-Related Decisions

- *Marshall v. Mayor of Savannah*, 366 Fed. Appx. 91 (11th Cir. 2010) – reprimand and, ultimately, termination based on MySpace photos did not violate First Amendment.
- *Snyder v. Millersville University*, 2008 U.S. Dist. LEXIS 97943 (E.D. PA 2008) – termination based on MySpace pictures did not violate First Amendment.
- *Jaszczyszyn v. Advantage Health Physician Network*, 504 Fed. Appx. 440 (6th Cir. 2012) – summary judgment based on Facebook pictures affirmed.



When Off-Duty Conduct Creeps Into the Workplace

Employers may be liable for claims of hostile work environment even if the alleged harassment occurs off-duty and away from the workplace if the complaining employee “is forced to work for, or in close proximity to, someone who is harassing her outside the workplace.” *Duggins ex rel. Duggins v. Steak ‘N Shake, Inc.*, 3 Fed. Appx. 302, 311 (6th Cir. 2001).

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The NLRB & Social Media

- The National Labor Relations Board uses the National Labor Relations Act to protect the rights of employees to act together to address conditions at work. This includes certain work-related conversations on social media.
- The NLRA is not applicable.

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Avoid Saying this to Employees about Confidentiality:

- "Don't disclose information about other employees."
- "Don't discuss pending legal matters."
- "Don't talk about the workplace except with your co-workers."
- "You may not make any public communications about the company or its business activities unless you have prior written authorization of the Communications Department."



Avoid Saying this to Employees About Being Judicious:

- "You must be sure that your posts are completely accurate and not misleading."
- "When in doubt, do not post."
- "Before you post, check with us [management] to make sure it's a good idea."
- "Don't pick fights."
- "Avoid discussing topics that may be considered objectionable or inflammatory."
- "Don't make disparaging or defamatory comments."



Develop Social Media Policies

- Address the fundamental issue of your agency's or company's culture and its approach to the use of social media by employees.
- Either embrace and encourage social media, be wary of it, or find a healthy balance between the two.



Why Do You Need a Social Media Policy?

- Protect your agency's/ company's trade secrets, confidential, proprietary, and/or privileged information.
- Protect your agency's/ company's reputation.
- Protect the privacy of other employees.
- Establish guidelines for whether use of social networking sites during work hours is permitted.



Considerations for Your Social Media Policy

- Determine how much personal use of social media will be permitted during working hours.
- Reserve the right to monitor employee use of social media while at work or while using company electronic devices.
- Specify uses of social media that violate the policy.
- Provide a resource for reporting violations.
- Obtain signed acknowledgments.

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Monitor and Enforce

- Decide what type of monitoring is needed and who is going to do it.
- Train your managers and supervisors.
- Be consistent and avoid selective enforcement.
- Keep up with the law, and revise the policy when necessary!

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Evidence Preservation

- Litigants have duty to preserve ESI when party reasonably foresees that evidence may be relevant to issues in litigation.
- Include duty to preserve social media in litigation hold letter.
- After duty to preserve arises, cannot delete or “clean up” social media profiles.



Consequences of Failing to Preserve

- *Lester v. Allied Concrete Co.*, 2013 Va. LEXIS 8 (Jan. 10, 2013) – attorney and Plaintiff sanctioned by the court.
- *Thurmond v. Bowman*, 2016 WL 1295957 (W.D.N.Y. Mar. 31, 2016) – Plaintiff’s emotional distress claim became subject of evidentiary hearing.
- *Gatto v. United Air Lines*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013) – defendants granted adverse inference instruction by the Court because Plaintiff intentionally deactivated his social media account.



Advising clients on social media accounts

If no duty to preserve exists, you can:

- Take down material from existing sites
- Use highest privacy and security levels on social media
- Move content from public to private portion of sites where available

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Questions?



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